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In the Supreme Court of the United States

OCTOBER TERM, 1987

RONALD TURCHI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

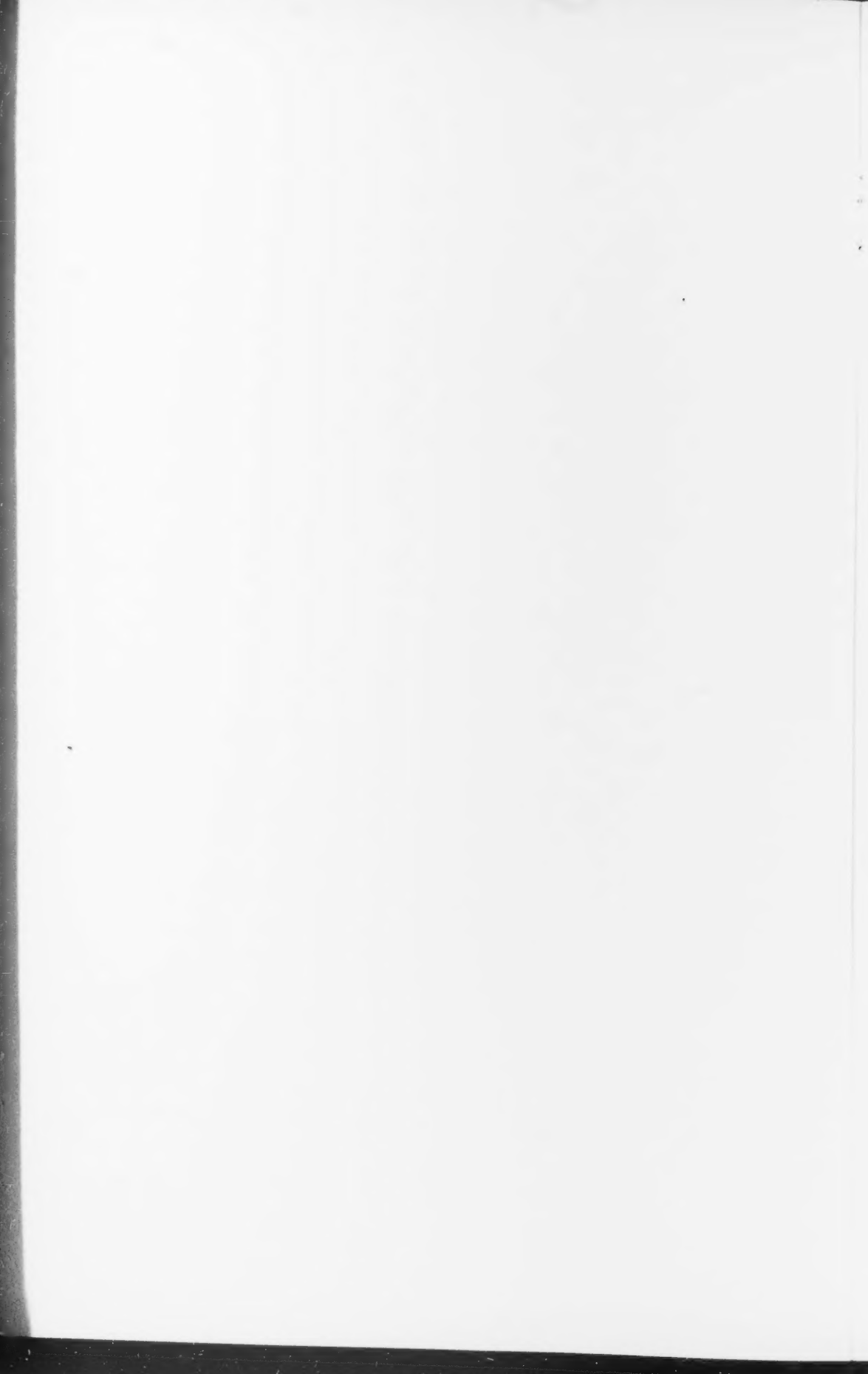
MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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6

TABLE OF AUTHORITIES

	Page
Cases:	
<i>Cuyler v. Sullivan</i> , 446 U.S. 335 (1980)	5
<i>Holloway v. Arkansas</i> , 435 U.S. 475 (1978)	5, 6
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	5
<i>United States v. Blum</i> , 753 F.2d 999 (11th Cir. 1985)	6
<i>United States v. Gambino</i> , 788 F.2d 938 (3d Cir. 1986), cert. denied, No. 85-2061 (Oct. 6, 1986)	5
<i>United States v. Morrone</i> , 502 F. Supp. 983 (E.D. Pa. 1980)	2
<i>United States v. Ramsey</i> , 661 F.2d 1013 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982)	6
<i>United States v. Sutton</i> , 794 F.2d 1415 (9th Cir. 1986) ...	5
Statutes:	
18 U.S.C. 1341	1
18 U.S.C. 1962(c)	1
18 U.S.C. 1962(d)	i
28 U.S.C. 2255	1, 2



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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied the effective assistance of counsel because of a de facto joint representation that created a conflict of interest and adversely affected his attorney's performance.

1. After a 1979 jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of racketeering and racketeering conspiracy, in violation of 18 U.S.C. 1962(c) and (d), and several counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to consecutive terms of 20 years' imprisonment on the racketeering counts, and consecutive terms of five years' imprisonment on the mail fraud counts, to be served concurrently with his 40-year term of imprisonment on the racketeering counts. The court of appeals affirmed without opinion, 672 F.2d 905 (1981), and this Court denied certiorari, 455 U.S. 941 (1982).

On March 27, 1985, petitioner moved under 28 U.S.C. 2255 to vacate his sentence on the ground of ineffective assistance of counsel. The district court denied the petition

(Pet. App. 19-40), and the court of appeals affirmed (supplemental filing).

2. The evidence at trial is summarized in *United States v. Morrone*, 502 F. Supp. 983, 986-989 (E.D. Pa. 1980). It showed that petitioner was associated with an arson-for-hire ring headed by co-defendant Michael Morrone that burned three commercial buildings in Philadelphia, Pennsylvania. In one instance, petitioner started the fire together with co-conspirator Richard Coppola, who pleaded guilty and appeared as the government's chief witness. The owner of the warehouse that was burned on that occasion, co-conspirator Moderwell Kester, submitted insurance claims for the property loss and received approximately \$20,000 as a result of the claims.¹

Petitioner and Morrone, who were tried with Kester, challenged Coppola's credibility. Petitioner testified at trial. He denied knowing Kester or participating in the racketeering enterprise. He also denied any involvement in two of the three proved fires. Petitioner admitted that he was initially involved in the third fire, but he claimed that at the last minute he backed out and Coppola set the fire alone.

3. In his Section 2255 motion, petitioner alleged that he was deprived of the effective assistance of counsel because his attorney labored under a conflict of interest. Petitioner claimed that his trial attorney, James T. Vernile, was tied professionally to Robert Simone, who represented co-defendant Michael Morrone at trial, and that Simone made the critical decisions regarding Morrone's and petitioner's defenses at trial. Pet. 4-6. Petitioner specifically alleged that this de facto joint representation

¹ Those submissions, which were made by mail, formed the basis for the mail fraud counts.

deprived him of counsel's assistance in exploring "possible plea options" before trial (C.A. App. 7-8).²

The magistrate conducted an evidentiary hearing on the motion. Following the hearing, the magistrate recommended that the motion be granted. Pet. App. 42-87. On the government's request for review of the magistrate's recommendation, the district court rejected the recommendation and denied the petition (*id.* at 19-40).

Addressing the claimed conflicts of interest, the district court found that Vernile's association with Simone did not establish joint representation and did not show that Vernile was an associate – formally or informally – in Simone's legal practice during petitioner's trial (Pet. App. 22-27). The court disagreed with petitioner's claim that the common defense strategy pursued by Vernile and Simone reflected joint representation and resulted in a conflict of interest (*id.* at 27-30). First, the court noted that petitioner did not allege that Vernile declined to meet with him privately to discuss the case without Morrone (*id.* at 31-32). Second, the court concluded that the reason Vernile did not discuss a guilty plea with the government was that petitioner maintained that he was innocent of the charges. Third, the court found that the decision to pursue a common defense was a reasonable one made with petitioner's best interests in mind (*id.* at 27-28, 33). Fourth, the court found that petitioner did not show that he probably would

² Petitioner also claimed that Vernile provided ineffective assistance by failing to call as trial witnesses the owners of the Archway Tavern, one of the burned properties. Those individuals had been represented by Vernile during an investigation by the Philadelphia Fire Marshal and had given statements in which they asserted that they did not know the cause of the fire or who was involved. Petitioner contended that those persons could have been called to corroborate his defense that he was not involved in the Archway Tavern fire, and he argued that the failure to call them resulted from Vernile's conflict of interest.

have pleaded guilty or that he was unaware of that possibility. Finally, the court concluded that petitioner had waived whatever complaint he may have had about any conflict of interest in light of the advice the court gave petitioner about his right to separate counsel or to a federal public defender (*id.* at 36-39).³

4. Petitioner contends (Pet. 9-16) that the facts adduced below demonstrate a "financial and professional interdependency" between Vernile and Simone that adversely affected Vernile's performance at trial. In particular, petitioner notes that Simone and Vernile had been associated until shortly before petitioner's criminal trial; that "Vernile was junior to Simone in both age and experience at the bar" (*id.* at 10); that Simone asked Vernile to represent petitioner; and that Simone directly paid Vernile out of funds raised for both petitioner and Morrone, even deciding how much money Vernile was to receive. This dependent relationship, petitioner contends, provides the only explanation for Vernile's failure to discuss the possibility of negotiating a favorable plea bargain that might have required petitioner to testify at trial against Morrone. Accordingly, petitioner concludes, the representation of petitioner and Morrone by "associated" lawyers resulted in a conflict of interest that adversely affected his attorney's performance.

To establish a deprivation of the right to the effective assistance of counsel on the ground of conflict of interest, the defendant must prove an actual conflict that adversely affected his attorney's performance at trial. Demonstrating

³ The district court further disagreed with petitioner that Vernile failed to call the Archway Tavern owners because of a conflict of interest. The court also rejected the claim that the testimony of the Archway Tavern owners that they did not know who set the fire would have been exculpatory, finding instead that evidence to be of "questionable" relevance. Petitioner does not contest those aspects of the court's decision.

a mere potential conflict will not suffice. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 487-491 (1978). Nor does joint representation necessarily result in a conflict of interest. *Cuyler v. Sullivan*, 446 U.S. at 348; *Holloway v. Arkansas*, 435 U.S. at 482; *United States v. Sutton*, 794 F.2d 1415, 1419 (9th Cir. 1986). Even if joint representation has been established, the defendant still must show that a conflict of interest arose from that representation; prejudice will be presumed only after the defendant establishes that counsel actively represented conflicting interests and that the conflict of interest adversely affected counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 692 (1984); *Cuyler v. Sullivan*, 446 U.S. at 348, 350; *United States v. Gambino*, 788 F.2d 938, 951 (3d Cir. 1986), cert. denied, No. 85-2061 (Oct. 6, 1986).

The district court found as a factual matter that neither the past professional ties between the two attorneys nor the circumstances of their common defense established a unity of interest amounting to joint representation of Morrone and petitioner (Pet. App. 27, 28). In particular, the district court found that the two attorneys entered separate appearances and considered themselves independent counsel for their clients; that Vernile had a practice separate from Simone's (with his own secretary, bank account, and stationery letterhead); and that petitioner bore the costs of Vernile's representation (*id.* at 22-24). The district court also found that the united defense strategy of denial and of discrediting Coppola, the government's chief witness, reflected a reasonably competent choice of tactics. The court found that Vernile's decision not to pursue a guilty plea was attributable to petitioner's insistence that he was not guilty and to Vernile's belief that his client's innocence would be established at trial by impeaching Coppola. *Id.* at 33. As to petitioner's contention (Pet. 11) that "[p]rior to trial, Vernile knew the govern-

ment had a strong case which included the testimony of a former member of the arson gang who would incriminate the Petitioner," the record shows that Vernile reasonably believed the government's case to turn on an impeachable witness whose credibility might well be rejected by the jury (Pet. App. 33).

Petitioner's argument is bottomed upon speculation that the circumstances surrounding the "association" between Vernile and Simone require the inference of a conflict of interest arising from something akin to joint representation, despite the contrary findings of the district court. In so arguing, petitioner disregards the fundamental principle that a common defense strategy does not prove a conflict of interest. *Holloway v. Arkansas*, 435 U.S. at 482-483; *United States v. Ramsey*, 661 F.2d 1013, 1019-1020 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982). He also disregards the district court's conclusion that at the time of trial petitioner knew of the relationship between Simone and Vernile and that he was informed of his right to separate counsel and the possible prejudice that could result from any joint representation. See *Holloway v. Arkansas*, 435 U.S. at 483 n.5 (defendant can waive right to conflict-free representation); *United States v. Blum*, 753 F.2d 999, 1006 (11th Cir. 1985).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

SEPTEMBER 1987

